House of Commons

Constitutional Affairs Committee

Compensation culture

Third Report of Session 2005–06

Volume I

HC 754–I

House of Commons

Constitutional Affairs Committee

Compensation culture

Third Report of Session 2005–06

Report, together with formal minutes

Ordered by The House of Commons
to be printed 14 February 2006

HC 754–I
Published on 1 March 2006
by authority of the House of Commons
London: The Stationery Office Limited
£0.00

The Constitutional Affairs Committee

The Constitutional Affairs Committee (previously the Committee on the Lord Chancellor's Department) is appointed by the House of Commons to examine the expenditure, administration and policy of the Department for Constitutional Affairs and associated public bodies.

Current membership

Rt Hon Alan Beith MP (*Liberal Democrat, Berwick-upon-Tweed*) (Chairman)
James Brokenshire MP (*Conservative, Hornchurch*)
David Howarth MP (*Liberal Democrat, Cambridge*)
Barbara Keeley MP (*Labour, Worsley*)
Mr Piara S Khabra MP (*Labour, Ealing Southall*)
Jessica Morden MP (*Labour, Newport East*)
Julie Morgan MP (*Labour, Cardiff North*)
Mr Andrew Tyrie MP (*Conservative, Chichester*)
Keith Vaz MP (*Labour, Leicester East*)
Dr Alan Whitehead MP (*Labour, Southampton Test*)
Jeremy Wright MP (*Conservative, Rugby and Kenilworth*)

Powers

The Committee is one of the departmental select committees, the powers of which are set out in House of Commons Standing Orders, principally in SO No 152. These are available on the Internet via www.parliament.uk

Publications

The Reports and evidence of the Committee are published by The Stationery Office by Order of the House.

All publications of the Committee (including press notices) are on the internet at www.parliament.uk/conaffcom

Committee staff

The current staff of the Committee are Roger Phillips (Clerk), Dr John Gearson (Second Clerk), Alexander Horne (Legal Specialist), Richard Poureshagh (Committee Assistant), Anne Woolhouse (Secretary), Tes Stranger (Senior Office Clerk) and Jessica Bridges-Palmer (Committee Media Officer).

Contacts

Correspondence should be addressed to the Clerk of the Constitutional Affairs Committee, House of Commons, 7 Millbank, London SW1P 3JA. The telephone number for general enquiries is 020 7219 8196 and the email address is conaffcom@parliament.uk
Media enquiries can be addressed to Jessica Bridges-Palmer, Committee Media Officer, House of Commons, 7 Millbank, London SW1P 3JA. Telephone number 020 7219 0718 and email address bridgespalmerj@parliament.uk

Contents

Report

Summary

This inquiry was set up to examine the compensation system in the United Kingdom and encompassed a wide range of topics, including the effect of the move to "no win, no fee" conditional fee agreements, the Compensation Bill [Lords], the NHS Redress Bill [Lords] and risk aversion in public bodies.

The Compensation Bill [Lords] seeks to restate the common law of negligence. This has apparently been included to reassure volunteers that they are protected from liability. Such a provision is unnecessary and may prove harmful. It neither satisfies those people who wish for volunteers to be provided with a special defence against claims of negligence, nor does it clarify the law. Instead, it is likely to lead to additional litigation, as people turn to the courts to define the precise nature of that provision.

The move from legal aid to conditional fee agreements may have broadened access to justice, but it has had some unfortunate side-effects. The regulation of claims "farmers", who refer claimants to solicitors, often selling them financial products in the course of the transaction, is welcome and overdue. We hope that through the Compensation Bill [Lords] the Government will introduce practical measures to tackle abuses such as claims farmers placing misleading advertisements and mis-selling financial products.

We also examined the proposed redress scheme for victims of medical negligence under the NHS Redress Bill [Lords]. Whilst the Government has given the Committee a number of guarantees about independence, it has not satisfied us that it has successfully engaged with practitioners (both medical and legal) to ensure that the scheme will work. It is not apparent how cost effective the scheme will be, and there has been no reliable evidence of the likely cost of claims which would not have been pursued if the scheme had not been set up. The Government should run a pilot of this ambitious scheme to enable it to assess properly its impact before it is introduced nationally.

Finally, we considered the issue of excessive risk aversion – in other words the propensity of organizations to avoid undertaking work which might have some risk attached, however slight. We found no evidence that conditional fee agreements or personal injury litigation were a significant factor in causing risk aversion, and personal injury litigation has not increased in recent years. Risk aversion has a number of complex causes, including advertising by claims management companies, selective media reporting, a lack of information about how the law works and, on occasion, a lack of common sense amongst those who implement health and safety guidelines. Risk aversion of this sort is a concerning modern phenomenon that has an adverse effect on both individuals and the economy as a whole. Instead of a statutory provision restating the law of negligence what is required is a clear leadership by the Government. This should include an education programme making clear that risk management does not equate to the avoidance of all risk and active engagement by the Health and Safety Executive to ensure that it adopts an approach which is proportionate, it does not over-regulate vulnerable sectors and instead offers appropriate advice and support.

1 Introduction

Terms of reference

1. The inquiry's terms of reference were to answer the following questions:

- Does the "compensation culture" exist?
- What has been the effect of the move to "no win, no fee" conditional fee agreements?
- Is the notion of a "compensation culture" leading to unnecessary risk aversion in public bodies?
- Should firms which refer people, manage or advertise conditional fee agreements be subject to regulations?
- Should any changes be made to the current laws relating to negligence?

2. At a preliminary stage in the inquiry, the Government introduced two relevant Bills (the Compensation Bill [Lords] and the NHS Redress Bill [Lords]) and so we decided to consider the merits of the Government's proposals.

Scope of the inquiry

3. We received over 60 submissions in response to our call for evidence. During our inquiry we took oral evidence from Baroness Ashton of Upholland, the Parliamentary Under Secretary of State at the Department of Constitutional Affairs and Rt Hon Jane Kennedy MP, the Minister of State at the Department of Health, the Lord Chief Justice, the Senior Costs Judge, two District Judges, the Law Society, the Bar Council, the Association of Personal Injury Lawyers, the Motor Accident Solicitors' Society, the Association of British Insurers, insurance companies, the Health and Safety Executive, Volunteering England, the Scout Association, the NHS Litigation Authority, Citizens Advice and the Advice Services Alliance. We are grateful to all who contributed oral and written evidence. We also wish to thank our special advisers, Mr John LeightonWilliams QC, Mr Edward Faulks QC and Professor Anthony Dugdale.

2 Conditional Fee Agreements

The introduction of CFAs

4. Conditional Fee Agreements (CFAs) are the form of contingent fee agreements ("no win, no fee") used in England and Wales between solicitors and clients. CFAs were introduced by the Courts and Legal Services Act 1990. This made provision for agreements in which it was explicit that part or all of the solicitor's fees were payable only in the event of success.[1]

5. CFAs allow a solicitor to take a case on the understanding that if the case is lost he will not charge his client for the work he has done. However, if the case is successful, the solicitor can charge a success fee on top of his normal fee to compensate him for the risk of not being paid. That success fee is calculated as a percentage of his normal fee and the level at which the success fee is set reflects the risk involved. The success fee is recoverable from the losing side. Prior to the changes under the Access to Justice Act 1999, any success fee was payable by the claimant. This fee is often referred to as an "uplift". Claims brought under a conditional fee agreement are often underpinned by "after the event" insurance (ATE insurance). This is an insurance policy that the claimant can take out after an accident has happened, but before (or in the course of) making a claim. The benefit of ATE insurance for the claimant is that, if he loses, the insurance company will pay the defendant's legal costs and expenses.

6. The Civil Justice Council recently produced a report in which it indicated that:

> Prior to the introduction of conditional fees in 1995 (personal injury, human rights and insolvency cases) and extended in 2000 to all civil cases (excluding family) people caught in the [access to justice gap] were described by the Consumer Association as 'Middle Income Not Eligible for Legal Aid Services (MINELAS). It was thought that conditional fees would allow this group to obtain access to justice.[2]

7. In oral evidence to the Committee, Anna Rowland of the Law Society confirmed that this had proved to be one of the advantages of CFAs. She said:

> [T]he eligibility rates for legal aid are now very low, whereas CFAs have opened up the possibility of getting redress for middle-income people who would have had no hopes of getting legal aid and they would not have had enough money to fund the case themselves, so there is a whole tranche of people who had no access there who will now be getting access.[3]

8. The implementation of the Access to Justice Act in 1999 precipitated a move from legal aid[4] to a system of "no win, no fee" conditional fees to fund legal advice and representation. The Government has indicated that its objective in introducing the 1999 Act was:

---

1 Ev 100, para

2 *Improved Access to Justice – Funding Options and Proportionate Costs*, Civil Justice Council, August 2005

3 Q54

4 Legal Aid was withdrawn for personal injuries claims (other than clinical negligence) in 2000.

> [T]o make justice affordable to all, to discourage weak claims and encourage early settlement. Allied to this was the desire to ease the administrative burden on those providing and purchasing legal services. The provisions in the Act gave effect to Parliament's intention to increase access to justice by making it easier and more affordable to use conditional fee agreements, insurance policies and equivalent forms of funding.[5]

The Act amongst other things made the success fee, specific insurance premiums and the self-insurance costs of membership organisations recoverable from the other party. The previous inability to recover these costs had been seen as a major barrier to accessing the courts. This amended system has now been in operation for approximately 5 years and this is therefore an opportune time to examine the progress of conditional fees. One of the major issues that appears to have arisen at about the same time as the introduction of CFAs has been the increased perception of a "compensation culture" leading organisations to become risk averse. We have attempted to assess whether there is any link between the two issues.

The use of CFAs

9. In its written evidence, the Department indicated that it had recently completed a review of the way in which CFAs are regulated and had brought into effect a new regulatory environment for CFAs from 1 November 2005. After extensive consultations the Department concluded that the secondary legislation governing CFAs had become too complex, had contributed to some satellite litigation[6] between liability insurers and claimant firms, was hard for many solicitors to use and was too difficult for most consumers to understand.

10. The consultations confirmed that much of the detail in the CFA regulations was unnecessary. The Department stated that effective consumer protection was best delivered by regulating effectively the providers of services. The Department confirmed that it had worked with the Law Society to design a package of changes to the regulations and to professional rules and associated guidance. It said:

> The amendments to professional rules will make clearer solicitors' responsibilities to their clients. In particular that they must explain to the client the terms of the agreement and in what circumstances, if any, the client will be required to pay anything.[7]

11. The amendment provides that where clients are represented under a CFA the solicitor should explain:

- the circumstances in which the client may be liable for his or her own costs and for the other party's costs;

5 www.dca.gov.uk

6 Satellite litigation is litigation about legal issues often peripheral to the main claim, in this instance usually litigation about costs incurred in bringing the action against a defendant

7 Ev 102, para 3.15

- the client's right to assessment of costs, wherever solicitors intend to seek payment of any or all of their costs from the client; and

- any interest a solicitor may have in recommending a particular policy or other funding.[8]

12. It is too early to judge the impact of these particular changes. However, even before we began this inquiry, it was apparent that change was needed. In a paper issued by the Advice Services Alliance[9] it was made plain that consumers could be put in a difficult position by signing up to "no win, no fee" agreements. One particular concern it identified was that, in certain circumstances, people who had taken out ATE insurance were forced (by the insurer) to accept offers of settlement even where they were less than they could normally have expected.[10] The paper also stated that "many people wrongly believe that win or lose, they will have nothing to pay" and points out that this is not true, since if you lose you will not have to pay your own solicitor's fees, but you will have to pay for the defendant's legal costs. If you had taken out ATE insurance, you would have to pay the cost of the insurance premium for that policy. Other concerns have been expressed about the mis-selling of ATE insurance in cases where consumers already have before the event insurance.[11] Complaints were also levelled at the conduct of claims management companies. These companies advertise widely on television, radio and other media and some advertise on hospital premises. The services that they offer vary from arranging ATE insurance, referring people with a claim to a solicitor (for which they would expect a referral fee) and acting as an intermediary between claimants and their solicitors.

13. In its report, *No win, No fee, No chance* (December 2004), Citizens Advice set out a number of concerns about the "no win, no fee" system. These included:

- Widespread mis-selling of legal and insurance products. Consumers were often induced into signing conditional fee agreements inappropriately.

- Consumers being subjected to high-pressure sales tactics by unqualified intermediaries introducing them to a legal process. Inappropriate marketing and sales practices were used – for example salesmen approaching accident victims in hospital.

- Loan financed insurance premiums, in addition to other legal costs, eroding the value of claimants' compensation. In some cases consumers even owed money at the end of the process. This, CAB believes, turned the whole claims process into a zero-sum game for consumers and denied effective access to compensation.

- Failure of the system to deliver anything effective to consumers on rehabilitation. International comparisons showed that the UK trailed behind other countries in getting injury victims back to work.

---

8 www.lawsociety.org.uk

9 *Claiming compensation,* Advice Services Alliance, March 2005 (www.advicenow.org.uk/compensation)

10 *ibid*

11 Before the event insurance (often referred to as BTE insurance) is a form of legal expenses insurance often added to car and household insurance policies. Employers and trade unions may also provide free legal assistance. Where a person has BTE insurance, the insurance company often chooses a solicitor for the claimant to use

- Conditional fee agreements creating perverse incentives for the legal profession and providing the conditions for cherry-picking of high value cases with high chances of success. This, it was claimed, resulted in lawyers refusing to take on good small claims which may nevertheless be of enormous financial and personal significance to the client, thus denying access to justice.

- The absence of a joined-up system for regulating conditional fee arrangements to ensure consumers are protected on both quality of advice and costs. In particular, the activities of claims management companies seemed to fall largely outside the system of regulation.

14. It has been reported that Citizens Advice have handled 130,000 problems relating to CFAs since 2000.[12] While the statistics provided by the Department for Constitutional Affairs demonstrate that the introduction of CFAs has not precipitated a huge rise in recorded claims (the figures they have provided show a drop of 5% between 2000 and 2005) the poor reputation of claims management companies and the proliferation of misleading advertisements may have helped add to the perception of a compensation culture.

15. Citizens Advice focused on this in oral evidence, claiming that:

> In a sense, with the legislation that is coming in to regulate the claims handling system, that is almost after the event. It could have been predicted really that you were unleashing the possibility for a whole new tribe of intermediary introducers to make some business here, coupled with advertising, which we have talked about, but also the introduction of referral fees as well. There were no measures taken to ensure consumer education, consumer protection from new market-based risks. You have opened up access to justice through a market solution, but you have not introduced the protections that might be needed to make sure that the market worked effectively for consumers, and the legal services market for that matter as well. That has led to a reputational effect for the whole legal services market which we are now trying to fix up by introducing some regulation of claims handlers. It is a pity we are having to do that after the event with the introduction of regulation. The whole package of introducing CFAs was not accompanied by proper consumer protection measures in anticipation of some of the problems that we have seen.[13]

16. The Department has acknowledged that the regulation of claims management companies is a priority, and is seeking to introduce a legislative framework through the Compensation Bill [Lords]. A detailed consideration of these plans can be found below (para 69 ff).

17. **The introduction of CFAs was designed, in part, to widen access to justice. The evidence appears to show that it has had some success in meeting that aim, although perversely some cases which previously would have received legal aid funding may not receive CFA funding because the chances of success are not high enough. Conditional fee agreements have not directly caused the perception of a compensation culture. The**

12 *Removing the high stakes of 'no win-no fee'*, Jon Robins, The Times, 10 January 2006

13 Q238

statistics demonstrate that the number of claims has not risen since CFAs were introduced as the primary method of funding personal injury claims. Nonetheless, we agree with the conclusions drawn by Citizens Advice, that the introduction of CFAs (and with it a class of unregulated intermediaries acting as claims managers) has adversely affected the reputation of legal service providers, whether professional lawyers or not. The increased awareness of the public that it is possible to sue without personal financial risk, when combined with media attention to apparently unmeritorious claims being brought, has contributed to a widely held opinion that we do indeed have a compensation culture.

Difficulties in Libel Cases

18. We received a large number of submissions from media organisations, indicating that they were particularly affected by the use of CFAs.[14] In many of these submissions there were complaints about instances where a claimant's solicitor might be seeking a 100% increase of base hourly costs (where their client is completely unaffected because he is not exposed to those costs).[15]

19. One of the main issues (for defendants) in libel cases is the proportionality of the costs and the lack of security for costs provided by claimants.[16] Cases can be brought under CFAs in circumstances where the claimant either would be unable to meet the defendant's costs were he or she to lose or where the potential damages available in no way reflected the cost of the proceedings.

20. In oral evidence, Lord Phillips of Worth Matravers, the Lord Chief Justice, summarised the crux of the difficulties:

> The problem arises in part because the costs of defamation actions seem to be so enormous, for a start. There are some claimants' solicitors who are prepared to undertake to act in defamation actions on a conditional fee basis, with uplift. Defamation actions are quite speculative and if you are giving an uplift that reflects the risk, it may be quite considerable. If they do not take out after-the-event insurance, and the litigant himself has no significant means, the publisher who is being sued is on the horns of a dilemma. If he fights the case and wins, he will have incurred very substantial costs and will not be able to recover them. It may be cheaper to settle at the outset, even if he thinks he has a strong case, and so there is I think a potential problem there. I am not sure that it would be solved by saying the claimant must take out after-the-event insurance against the risk of losing, thereby in effect ensuring that the defendant will get his costs if he wins, because the premium

14 Although we received many submissions from the media, we are conscious that we received little from actual or potential claimants or their representatives. The lack of an obvious claimant "group" explains this. But the result is that the evidence was not as balanced in terms of its sources as we would have liked

15 This scenario was recognised by the House of Lords in the leading case of Callery v Gray [2002] UKHL 28, in which Lord Bingham of Cornhill commented that: "One possible abuse was that lawyers would be willing to act for claimants on a conditional fee basis but would charge excessive fees for their basic costs, knowing that their own client would not have to pay them and that the burden would in all probability fall on the defendant or his liability insurers"

16 The well known litigation between Naomi Campbell and the Mirror Group in a privacy case [Campbell v MGM Ltd [2005] UKHL 61] is probably a bad example, because despite the low damages awarded to the claimant (£3,500), the case itself developed the law (a process which has always been expensive for litigants given the United Kingdom's common law tradition)

> for such insurance cover would again be enormous and I suspect the publishers, when they lost, would be complaining at the quite inordinate, they would say, bill of costs that they were then called upon to pay.[17]

21. Many of the submissions from media organisations made reference to a potential breach of article 10 of the European Convention on Human Rights (relating to freedom of expression) due to the 'blackmail' effect of such costs.[18]

22. In the *Campbell* case the House of Lords did not accept this argument, concluding that the interference with free speech which large costs awards entailed was legitimate insofar as CFAs were prescribed by Parliament as a means of funding litigation. The court noted that there was no obligation on a lawyer to ascertain that a client could not bring the action without a CFA and they could not see any obvious workable method for requiring this. However, although constrained by the law to permit the uplifts, the court did express disquiet at the operation of CFAs in media cases suggesting a "legislative solution" might be required.

23. During the course of our inquiry there appeared to have been some developments in this area. It was reported recently that Senior Costs Judge Peter Hurst had determined that defamation lawyers should not seek to recover their costs at city rates. [19]

24. The other method in which proportionality could be achieved is by staging the uplift (success fee) dependent on both the risk that the claimants' solicitors were taking and the stage that the proceedings had reached – the risk is assessed at particular waypoints during the course of preparation of a case. This is already prescribed by the CPR (Civil Procedure Rules) in road traffic, employers' liability and certain types of disease claims. In defamation work, however, the high costs and inherent risks mean that where a contested case reaches court without an admission of liability, the claimant's lawyers will expect a substantial uplift to cover the risk.

25. We understand that staging already occurs in many defamation actions. However, media organisations complained that they were faced with uplifts even where they had admitted that an article was defamatory and were seeking to settle an action (so that, they claimed, the claimant's solicitors were not exposed to any significant risk).[20] Another allegation is that claimant lawyers "cherry-pick" cases and eliminate most of the risk involved before agreeing to pursue the case on a CFA.

---

17 Q25

18 See written evidence of Associated Newspapers (Ev 109) and Guardian Newspapers (Ev 115) which refer to the *Turcu case [2005]* EWHC 799 QB in which Mr Justice Eady commented that: "[…]there must be a significant temptation to media defendants to pay up something, to be rid of litigation for purely commercial reasons and without regard to the true merits of any pleaded defence. This is the so-called "chilling effect" or "ransom factor" inherent in the conditional fee system … This is a situation which could not have arisen in the past and is very much a modern development"

19 *Seconds out – the fight on costs*, Amber Melville Brown, Law Society Gazette, 5 January 2006

20 For example, in its written evidence (Ev 113, para 3.4), the Guardian has complained that: "Often insurance is taken out even before a media defendant has had an opportunity to respond to an initial letter of claim. In May this year the Guardian settled a claim brought against it by an army officer within seven days of receiving a letter before action. The newspaper paid substantial damages, published an apology and agreed to pay costs. Despite the fact that a settlement was reached promptly and the newspaper did not attempt to defend the claim, the claimant's lawyers sought costs of over £9,000, including a 25% success fee and an insurance premium of £2,400. The claimant's lawyers took out insurance notwithstanding that the newspaper had recently been ordered to pay damages of £58,500 in connection with an identical claim about the same article brought by another army officer"

26. It is plain that uplifts should reflect the risks involved. The problem lies in the fact that at present risk is assessed when the case is taken on. That risk may vary considerably as the case proceeds eg when new evidence comes to light but there is (normally) no mechanism whereby that risk is reassessed. A case, high risk at first, may become less of a problem when liability is admitted, and vice versa.

27. When lawyers take on cases under CFAs they have to make a formal risk assessment which will then be referred to when it comes to assessing costs. The court has power to reject a claim for a specified uplift where it does not agree with the initial assessment of risk and may reduce an hourly rate claimed or reassess hours spent. When the difficulty of disproportionate costs was put to the Lord Chief Justice he commented "[t]he remedy must be to apply at an early stage for a cap on the costs."[21] Such a power exists under s 51 of the Supreme Court Act 1981, the enabling power under Civil Procedure Rule 3.2(m) and the inherent jurisdiction of the court. Cost caps have been imposed in defamation cases[22] and could prove a useful safeguard to ensure proportionality.

28. We note the suggestion by some commentators that cost managed hearings would be a useful practice. It might well prove beneficial, where parties intend to use a CFA and are not supported by after the event insurance, if some form of cost management hearing took place once the proceedings were issued so that the court could intervene at an early stage and impose a cap if necessary. If the level of uplift that claimant solicitors were entitled to was restricted until this had taken place, this could ensure some level of proportionality to proceedings. There are practical problems with this approach. Following oral evidence from the Minister, we understand that DCA officials will be meeting with senior members of the judiciary to discuss these matters.[23]

29. Proportionality of costs in defamation cases is difficult to achieve. **It is not easy to design a system whereby a claimant without funds is allowed access to justice without exposing the defendant to the chance that he will not recover the costs of the action if the claimant is unsuccessful. Given the power of the press, it is right that people should have a remedy when have been defamed; and because of the high level of costs inherent in bringing a claim it is likely that those with modest means will continue to have to rely on CFAs.**

30. **The uplifts which claimant's solicitors receive should reflect the risk that they bear. Reassessment of risk as the claim proceeds may go some way to ensuring proportionality, but only for that stage of the proceedings. This would require a clearly staged process. Further use of cost capping orders may prove useful in some circumstances. The courts need to ensure that appropriate case management takes account of proportionality, preferably before the costs are actually incurred.**

21 Q27

22 See *If costs don't fit – cap them*, Amber Melville Brown, Law Society Gazette, 7 April 2005 in which the case of *Alberta Matadeen v Associated Newspapers Ltd* where a cost cap was imposed in circumstances where the claimant was represented under a CFA is discussed

23 Q310

3 The Compensation Bill [Lords] and Risk Aversion

Excessive Risk Aversion

31. Although the evidence does not support the view that increased litigation has created a "compensation culture", there is plenty of evidence of excessive risk aversion and a mistaken perception that it is caused by litigation. In its report, *Better Routes to Redress*[24] the Better Regulation Task Force (now the Better Regulation Commission) concluded that:

> Media reports and claims management companies encourage people to "have a go" by creating a perception, quite inaccurately, that large sums of money are easily accessible. It is this perception that causes the real problem: the fear of litigation impacts on behaviour and imposes burdens on organisations trying to handle claims. The judicial process is very good at sorting the wheat from the chaff, but all claims must still be assessed in the early stages. Redress for a genuine claimant is hampered by the spurious claims arising from the perception of a compensation culture. The compensation culture is a myth; but the cost of this belief is very real.[25]

32. The evidence from the Compensation Recovery Unit tends to support this view, demonstrating that there has not been an upward trend of recorded accident claims since CFAs were introduced. Many witnesses were keen to demonstrate that between 2000 and 2005 the number of personal injury claims had fallen. The Department for Constitutional Affairs suggested that there had been a 5% reduction in accident claims in that period.

33. It is more difficult to assess the trends over a longer period. to the assessment of Ken Oliphant, a senior lecturer in law at Cardiff University, is that:

> The term "compensation culture" is too often employed uncritically, without any real effort to explain the negative connotations that are clearly intended. That there has been a rise in the number of compensation claims in (say) the last 30 years is easy to establish. The *Pearson Report* estimated that in 1973 approximately 250,000 personal injury claims were pursued through the tort system. Compensation Recovery Unit (CRU) figures now demonstrate that, in four of the last five years, new personal injury claims have numbered in excess of 700,000. But the mere rise in claims numbers does not itself provide evidence of a debilitating compensation culture – it could be, for example, that there was very significant *under*-claiming in the past.[26]

34. The view that claims had increased over the past 30 years was supported by a further study conducted by Annette Morris (also from Cardiff University). In summary, she concluded that:

24 *Better Routes to Redress* , Better Regulation Task Force, May 2004 (available at www.brc.gov.uk)

25 *ibid*

26 Ev 122, para 3

> [An] analysis of as yet unpublished data suggests that the propensity of accident victims in England and Wales to claim compensation through the tort system has generally increased since the 1970s. Contrary to popular belief, however, it has remained relatively stable since 2000, if not since 1997/1998. The upward trend in claims abated, therefore, when no-win no-fee advertising achieved prominence.[27]

35. Nonetheless, even if there has been an upward drift in claims since the 1970's, the *Better Routes to Redress* report demonstrated that the cost of tort cases as a percentage of GDP in 2000 was well below those of many other developed countries and that the UK was not going down the same litigious route as the United States.[28]

36. In its response to the Task Force's report in November 2004, the Government made clear its determination to tackle the issue and announced a wide programme of work. Its core objectives are to:

- Prevent a compensation culture from developing;
- Tackle perceptions that can lead to a disproportionate fear of litigation and risk averse behaviour;
- Find ways to discourage and resist bad claims;
- Improve the system for those with a valid claim for compensation.[29]

37. In November 2005 a conference on *Risk and Redress: Preventing a compensation culture*[30] involving six Ministers and a wide range of stakeholders, sought to take stock of progress, set out the future direction of the Government's work and to share information and promote discussion. On that occasion Rt Hon Lord Falconer of Thoroton, the Lord Chancellor, said:

> It is vital compensation claims continue to play their part in improving health and safety. But we must be clear that our continued commitment to legitimate compensation claims is entirely consistent with rejecting a culture which says for every injury there must be someone liable to pay. That culture stultifies reasonable risk taking, it hits organisational efficiency and competitiveness and it prevents worthwhile activity.

38. At that conference Lord Hunt of Kings Heath, the Minister with responsibility for health and safety, admitted that poor, overcautious risk management:

- Stifled creativity and efficiency in both public and private sectors;
- Restricted personal freedoms, particularly for children;

---

27 .*Spiralling or stabilising? the compensation culture and our propensity to claim damages for personal injury,* Annette Morris, January 2006

28 The report demonstrated that between 1989-2000 the figure was at 0.6 as a percentage of GDP (except in 1993, when it climbed to 0.7%). In comparison, in 2000, the percentages in France, Germany, Italy and the United States were 0.8%, 1.3%, 1.7& and 1.9% of GDP. See www.brc.gov.uk

29 Ev 99, para 2.2

30 *Risk and Redress: Preventing a compensation culture*, 17 November 2005

- Diverted attention away from serious risks.

39. The fact that the actual number of claims may now be falling does not appear to have affected the media or public perception of a compensation culture. In part, this may be due to a large number of stories of risk aversion in the national media. Over the course of our inquiry a number of anecdotal examples came to light. These included claims that Lord Bingham, the senior Law Lord, had clashed with officials over the placement of bookshelves at the proposed new Supreme Court at the Middlesex Guildhall.[31] An example was provided in oral evidence by the Lord Chief Justice, who commented that he had been prevented from swimming in the absence of a lifeguard.[32] In a further recent example it was reported that a hamlet in Wales was denied doorstep delivery by the Royal Mail because of the health and safety dangers to a postman inherent in climbing over a stile.[33]

40. The profusion of such stories suggests that the Government is not meeting its target to reduce risk averse behaviour. As the Better Regulation Task Force observed, "we live in a much richer, but more risk averse society than ever before".[34] We accept their point that "the media regularly report claims for apparently exorbitant sums, without later reporting the final outcome, which may have been very difficult".[35] This type of reporting can have serious consequences. In a report for Volunteering England and the Institute for Volunteering Research,[36] Katherine Gaskin said:

> The pro-riskers have argued that many of the medical and scientific advances we now take for granted would never have seen the light of day if previous generations had been so obsessed with risk. In his speech to the Institute of Public Policy Research, the Prime Minister moved almost seamlessly from discussion of risk and the compensation culture to political points about MMR, mobile phones, SARS and GM foods, suggesting public caution fuelled by the media, is holding back progress[…] The price we pay is that "we are unable to exploit our scientific discoveries" and "we lose out in business to India and China, who are prepared to accept the risk".[37]

41. An issue which was previously examined by the Better Regulation Task Force is the direct cost to public authorities of what they identified as a "have a go culture". As they indicated, dealing with complaints and claims can cost a great deal of money. One example

---

31 *Brief Encounters*, Joshua Rosenberg, Daily Telegraph, 15 December 2005. Officials had allegedly told him that such bookshelves could not be placed above shoulder height since someone might fall and hurt themselves if books could not be taken off the shelves without the use of a chair or a ladder. Lord Bingham is reported to have claimed that "This has to be the stupidest regulation that anybody has ever made"

32 Q3

33 *One small step for man is step too far for postie*, Dominic Kennedy, Times, 28 January 2006

34 *Better Routes to Redress,* Better Regulation Task Force, May 2004

35 *Ibid*

36 *Getting a Grip, Risk, risk management and volunteering, A review of the literature*, Katherine Gaskin, October 2005

37 *Ibid*; the paper also quotes from John Sunderland, president of the CBI, who stated that we need to learn from China, whose businesses enjoy the same "fearlessness about risk" as Britain's did in the Industrial Revolution, but contrasted that approach with criticisms from George Monbiot, who claimed that "Chinese bosses are allowed to kill their workers" and that "risk taking entrepreneurs […] were dependent upon the risks of losing limbs, eyes , lungs and lives they imposed upon their workforce"

they gave was of a large local authority which estimated that it had spent over £2m in staff costs, claims handlers and premiums from its £22m highways budget[38]

42. Risk aversion also affects the willingness of individuals to volunteer. In oral evidence, Dr Justin Davis-Smith, the Deputy Chief Executive of Volunteering England, stated that 5% of volunteers had considered giving up because of the fear of litigation[39] and went on to add that:

> Professor Heinz Woolf has talked about 'vitamin R' or 'vitamin Risk' being of huge importance to young people and how volunteering can provide that injection of 'vitamin R'. When we see evidence from organisational surveys that suggests that organisations are beginning to become so concerned about the fear of litigation that they are closing down some of these risky activities for young people to develop themselves we are obviously concerned and we want to try at this stage, before it gets worse, to put in place some procedures to try and alleviate the situation.[40]

43. These difficulties were also reflected in the evidence of Derek Twine, the Chief Executive of the Scout Association, who said:

> In the past few weeks we have undertaken a much wider and up-to-date survey within our own organisation and we have identified the figures as being quite a concern to us in that 50% of our existing volunteers are concerned that fear of being sued for compensation is affecting the retention of themselves and their peers as volunteers. 70% of them are testifying that the fear of being sued is a deterrent to recruiting additional volunteers into the organisation because they see that as a very real pressure upon them.[41]

44. We raised these issues with the Health and Safety Executive (HSE) in oral evidence. Jonathan Rees, the Deputy Chief Executive, gave evidence that the risk assessment process was not designed to have the outcome of increasing risk aversion. He stated that:

> [R]isk assessment is not meant to be a particularly complicated process. When we have talked at events, and you will have seen them too, of the professor who had to fill in a 69-page risk assessment before he went on a field visit, that is ridiculous, and we have said it is ridiculous, but there is no doubt that that exists, and one of the issues that we are trying to get at is why does that exist?[42]

45. However, he went on to say:

> I think the short answer is that we do need to make sure that the advice and guidance that we give to people is not encouraging unnecessary risk aversion. Let me give you

38 *Better Routes to Redress,* Better Regulation Task Force, May 2004. The difficulties faced by local authorities were also discussed at the *Risk and Redress Conference,* where a representative from Knowlsey Council indicated that following the introduction of CFAs the council had received a large number of claims (many of them vexatious), but that following investigation and a policy decision not to settle bad claims, the number of claims had fallen back substantially

39 Q175

40 *Ibid*

41 Q176

42 Q152

> an example (which may or may not come up) - swimming pools. We produce guidance on swimming pools which is designed to give best practice for those who operate swimming pools, by and large local authorities. The aim of that guidance is to prevent something like 800 or 900 operators of swimming pools having to work out what their own guidance could be as to the sorts of things that they ought to look for, but the very fact that we produce guidance, which I fear is quite thick and voluminous, you can look at it on the website, then gets people to think, "Aha, maybe there is a risk around swimming pools", and that is one of the issues that we are concerned about in terms of are we sending the right signals in the guidance which we are trying to give in terms of being helpful? [Emphasis Added]

46. A further area of discussion was that of targets. It was put to Mr Rees that the nature of the targets to reduce the number of accidents implied that risk was a bad thing and was to be avoided at all cost. He replied that:

> [T]he public service agreement that the Treasury has set us, which is to reduce the number of accidents, reduce the incidence of ill-health and reduce days lost. But I accept entirely the thrust behind it that what we are about is promoting sensible risk management, and I think that we as an organisation accept that accidents will always occur at some point, and I do not think we are quite there yet, we will enter the period where all risks are sensibly managed, but, as you will be well aware, last year when we published our statistics there were still 220 people killed, 150,000 serious injuries and accidents that occur in the work place and two million people are injured; so it remains important for us to try and reduce that[…] From an operational point of view we want to concentrate our resources on those areas where the risks are greatest, which will predominantly be areas like construction, or where the risks of something going wrong is catastrophic, which is nuclear power stations; so we are not interested, by and large, in worrying about hanging baskets or some of the other areas which undeniably do occur in the press.[43]

47. In respect of this question of targets, Mr Rees concluded by indicating that:

> You can couch the targets in different ways. I personally think that an outcome-based target is a pretty good thing for an organisation to have. I would say that it is not only us that will help achieve it, and I think that then perhaps helps with the link. The only way that accidents will be reduced is if everybody in the system actually manages risk sensibly.[44]

48. In a supplemental written submission, the HSE added that "we make extensive reference to the targets internally and externally, particularly in each of our business plans and annual reports. HSC[Health and Safety Commission] publishes annual health and safety statistics, which include data on progress towards the targets[…]The targets are well known throughout health and safety world"[45]

---

43 Qq154, 155

44 Q156

45 Ev 92

49. **We believe that the question of how to set targets for the HSE is an important one, since it may well affect the culture of the organisation. If the targets are set in terms of a reduction in the number of accidents, rather than in terms of ensuring that reasonable measures are taken to reduce risk, the likely outcome is that activities will be stopped altogether rather than being better managed. We believe that the basis of these targets should be reviewed.** Moreover, such targets can encourage the removal of one risk by creating a greater risk which falls outside the responsibility of the body concerned. If railway industry safety rules prevent a train from stopping because the platform is short, passengers may exchange a low risk of a sprained ankle for a higher risk of a road journey where accidents are much more common. **The HSE admitted that it was unable to conduct risk balancing exercises looking at the dangers of different risks.**[46] **We do not accept this and believe that the HSE should find ways of doing so.**

50. Necessary risk management needs to be balanced with sufficient common sense and proportionality to avoid the types of decisions that are frequently reported in the media. The response that greets most serious accidents must have some impact on the actions of designated health and safety officers in public authorities. **It has also been suggested that authorities and other bodies fall back on health and safety arguments when they are unable to provide a service for financial or other reasons. Such practices should be identified and eradicated.** Even this does not explain all of the perverse decisions that make their way into the national consciousness. In evidence to the Committee, Mr Rees commented that nobody really knew why people took these odd decisions; but conceded that HSE and other parties all shared some of the blame.[47]

51. **While we accept that health and safety issues can be an easy scapegoat for many problems, far more has to be done to educate the public that responsible risk management does not equate to the avoidance of all risk.**

52. **Methods of stemming current levels of risk aversion go to the heart of the compensation culture debate. While the number of people claiming compensation may not have risen in recent years, a contrary perception remains. The fear of prosecution by the Health and Safety Executive is likely to combine with the exaggerated fear of being sued to discourage people from planning or undertaking activities which require risk management and may also impact on the competitiveness of business.**

Clause 1 of the Compensation Bill [Lords]

53. The Government is seeking to address risk aversion partly by means of the Compensation Bill [Lords], which contains provisions in relation to the law of negligence and the regulation of claims management companies. Clause 1 of the Bill is the most controversial element. It is titled "deterrent effect of potential liability" and reads as follows:

46 See for example Q 173, where Jonathon Rees commented that: "The […] classic example which is always quoted is in Milford Haven where they closed a school because it was too close to one of the plants there and the children then had to walk two miles down a busy road so what is the nature of the risk. I have to say that the system at the moment does not make it easy because it tends to be focused on individual duty holders to look at the risks for which they are responsible (and that is what is in the 1974 Act) rather than trying to look at the nature of different risks. I think that is one of the things that we will want to bring out"

47 Q158

> *A court considering a claim in negligence may, in determining whether the defendant should have taken particular steps to meet the standard of care (whether by taking precautions against a risk or otherwise), have regard to whether a requirement to take those steps might –*
>
> *(a) prevent a desirable activity from being undertaken at all, to a particular extent or in a particular way, or*
>
> *(b) discourage persons from undertaking functions in connection with a desirable activity.*

54. At the conference mentioned above[48] the Government indicated that this provision is not intended either to provide a defence against claims for negligence, or to change the common law of negligence, particularly the element relating to "duty of care". At the second reading debate in the House of Lords, Baroness Ashton of Upholland explained that:

> This Bill is part of a much wider set of initiatives that [are] being taken forward across [G]overnment. The Government are determined to tackle practices that stop normal activity taking place because people fear litigation, or have become risk averse. We want to stop people from being encouraged to bring frivolous or speculative claims for compensation. The provisions of this Bill will help us do that. They will reassure people who are concerned that, if they adopt reasonable standards and procedures, they will not be found liable […] Clause 1 is concerned only with the approach of the court in assessing [the question of fact as to whether the defendant has met the standard of reasonable care] and not what that standard of care should be, nor whether the defendant owed a duty of care to the claimant. The clause states that one of the factors the court can take into account in this process is whether a requirement that the defendant should have done a particular thing would prevent or obstruct a desirable activity from occurring or discourage people from providing that activity. This provision reflects guidance given by the higher courts during a considerable period and renewed in recent cases. It will ensure that not only are all courts but also litigants and potential litigants are aware of this, and will provide reassurance to the many people and organisations, such as those in the voluntary sector who are concerned about potential litigation.[49]

55. Clause 1 is concerned only with claims in negligence. It has no wider remit in tort. It has no relevance to the criminal law and cannot be invoked by a defendant in, say, a health and safety prosecution. The wording of the Clause limits its application to the standard of care; it is not relevant in deciding whether a duty of care is owed. Thus, any "deterrent effect" which the title of Clause 1 appears to ascribe to it will be limited.

48 *Risk and Redress: Preventing a compensation culture*, 17 November 2005

49 HL Deb, 28 November 2005, cols 81-82

56. In the Explanatory Note to the Bill, the Government has indicated that the provision "reflects the existing law and approach of the courts as expressed in recent judgments of the higher courts".[50]

57. Two main issues arise as a result of these comments:

- The first is that it is not clear precisely what effect the provision is meant to have. If it is a mere restatement of the existing law, it seems unnecessary to use primary legislation;
- The second issue is that the Bill, whatever the intention of the Government, is likely at least in the short term to lead to additional litigation. This was the view of almost every witness who appeared before the Committee. The clause does not provide a definition of "desirable activity" and it is not clear at this stage how far it is intended to apply (for example whether it would extend to employees).

58. Much of the evidence received by the Committee focused on the issue of clause 1. A large number of concerns were highlighted relating both to the drafting of the clause itself and the likely outcome of introducing primary legislation. These concerns were not confined to one particular side of the compensation debate. In particular the Law Society commented that:

> As currently drafted we believe clause 1 may encourage courts to take a different approach. We are concerned that courts may find an organisation to be negligent using the reasonable care test, but then go on to make a finding that the organisation should not be liable because the organisation has made it clear that a finding of negligence will lead to them ceasing to undertake the activity in question. We believe that this may encourage poor safety standards and deny redress to people who have been injured by negligence.[51]

59. The insurance industry indicated that they were not particularly supportive of the move. Norwich Union stated that stated it "believes that the current common law is both clear and well established, and questions whether new legislation on negligence is necessary".[52] In oral evidence Nick Starling of the Association of British Insurers stated that "broadly speaking, we do not see the need for this particular clause. It is not for us the main issue in the whole issue around the compensation culture and the compensation debate".[53]

60. The TUC also raised concerns about the drafting of the clause, highlighting a number of potential difficulties:

> The Government has indicated that its intention is simply to clarify the existing law to make it clear that there is no liability and negligence for untoward incidents that could not be avoided by taking reasonable care or exercising reasonable skill. The

50 This is apparently meant to reflect the reasoning of the House of Lords in Tomlinson v Congleton Borough Council [2004] 1 AC. In thatcase, Mr Tomlinson suffered severe injuries by making a shallow dive into a lake.The House of Lords eventually found in favour of the Borough Council. Their Lordships found that although the Borough Council had a duty of care to both visitors and trespassers to its property, it was not, on the facts of the case, reasonable to expect the council to protect Mr Tomlinson from his own actions (he ignored prominent warning signs). The wording of the clause, is not, however identical to the judgment in that case and may not truly reflect its reasoning

51 Ev 69

52 Ev 84, para 12

53 Q112

> TUC does not believe that the proposed wording within the bill does that. Instead the provision will lead to a two-tier civil compensation system with workers in occupations deemed a "desirable activity" being denied access to the civil courts. There have been indications that the proposed wording is meant to reflect the judgement in Tomlinson v Congleton BC […] However there are at least two significant differences between the Bill and the judgement given in the Court of Appeal. The first is that this judgement referred to "social value" and not "[desirable] activity". These are very different and the latter is much wider. Secondly, the judgement was never intended to cover those who undertake an activity as part of their work. It related to those who choose to take risky activities. This was made quite clear in the judgement, where Lord Hoffmann commented "a duty to protect against obvious risks...exists only in cases where there is no genuine informed choice, as in the case of employees." This clear distinction is not made in the Bill. Whether any new legislation is necessary is highly doubtful. The Tomlinson judgement stands regardless of any legislation.[54]

61. The Lord Chief Justice, while wishing to avoid too specific a comment about Clause 1, thought that it was "quite impossible to encapsulate the law of negligence in a single sentence".[55] He said:

> I do not know who is going to read [clause 1]. The average man in the street is unlikely to be reading clause 1. As far as the judges are concerned, and judges and lawyers are the ones likely to be reading statutes, the clause sets out to define the position at common law, not to change it, and I would hope that most judges are now fairly well aware of the position at common law. Lord Hoffmann enunciated it very clearly fairly recently in the case of Tomlinson.[56]

62. A number of other witnesses made plain that they did not believe that including a clause of this type in primary legislation would inform the public, or voluntary groups, and considered that education, the provision of information and the challenging of terms like the "compensation culture" were better ways to change attitudes.[57] Other witnesses have made plain that they do not believe Clause 1 goes far enough.[58] Baroness Ashton of Upholland herself admitted that clause 1 is only a "tiny part" of what the Government is doing.[59]

63. Further difficulties became evident when St John Ambulance, a group which supported the principle of the clause, indicated that:

---

54 Ev 120, para 35

55 Q8

56 Q4

57 See Q258

58 See Qq 192, 194 and 258. In a submission by the All Party Group on Adventure and Recreation in Society (Ev 125), Members argued that: "If we are to encourage volunteering in the sport, adventure and recreational sectors and provide children, young people and adults with worthwhile experiences, we must raise the burden of proof and re-establish the legal principle of 'reckless disregard' in this sector. Several American states have done this for sport and adventure training, by statute. In effect, it means that a higher burden of proof is needed to establish negligence"

59 Q266

> [T]here seems to be no attempt to define 'desirable activity', with the matter being left to the courts[…] We[…] feel that it would be helpful if the Bill made an attempt to provide a 'non-exhaustive' list of the particular 'desirable activities' that were contemplated.[60]

64. The Parliamentary Under Secretary of State indicated that she was not "wedded" to the words "desirable activity".[61] Nevertheless, alternative terms such as "social value" or "social utility" would be similarly uncertain.

65. Volunteers are an important interest group that the Clause is aimed to protect. In order to ensure legal certainty, the Government should make plain whether it wishes to aid the efforts of volunteers by providing them with some kind of defence to negligence or not. Simply re-stating the common law in a statute will not provide any additional service to them. If the Government opts for this, it should state that preference clearly and should openly address the difficulties that would follow from allowing such a defence. In those circumstances, some form of first party insurance cover might be required by persons undertaking potentially dangerous activities while supervised by volunteers. Otherwise, where people were severely injured, they would have no recourse to any form of compensation.

66. A further, linked, issue is whether there should be a distinction between activities undertaken by adults, who were able to give informed consent to any risk, and those undertaken by children. It is possible to envisage circumstances where some adults who wished to undertake risky activities could opt out of the terms of the Unfair Contract Terms Act 1977 relating to personal injuries where they had arranged the necessary insurance cover.[62] This may prove not to be a popular solution, however, where minors are involved.

67. **We agree with the majority of the evidence that we have received that clause 1 to the Compensation Bill [Lords] is unnecessary. We have concluded that it should not be in the Bill. While it is undoubtedly well meaning, it satisfies neither those who wish to reduce risk aversion in society, nor those requiring legal certainty. It is impossible to encapsulate the law of negligence in a single sentence.**

68. **If clause 1 were implemented, it would undoubtedly, at least in the short term, lead to an increase in costly satellite litigation to define what is a "desirable activity". Moreover, the wide breadth of that term (or any alternative proposed such as "social value" or "utility") could have unforeseen consequences, since while the Government states that it is not intended to change the law, it is likely that interested parties will seek to rely upon the clause before the courts in order to improve their shield against liability. This could result in possibly inconsistent decisions where judges try to refine further the concept of "desirable activity".**

60 Ev 124, para 10

61 Q267

62 Section 2 of the Unfair Contract Terms Act 1977 provides that in relation to negligence liability: (1) A person cannot by reference to any contract term or to a notice given to persons generally or to particular persons exclude or restrict his liability for death or personal injury resulting from negligence. (2) In the case of other loss or damage, a person cannot so exclude or restrict his liability for negligence except in so far as the term or notice satisfies the requirement of reasonableness. This means that clubs or other bodies engaging volunteers cannot contractually exclude liability for personal injury either against the volunteers or the users of their services

Regulation of claims management companies

69. The second part of the Bill sets out a framework for the regulation of claims management companies. This has been welcomed by the vast majority of stakeholders.

70. In a recent article in The Times, a partner in a firm which conducts personal injury highlighted the problem :

> Lets take[…] a driver suffering a minor whiplash via a rear shunt crash[…] Chances are that within hours, if not days, the injured driver will be bombarded with offers of legal assistance. They may come from claims farmers on the prowl, from lawyers who have an arrangement with the crash pick up truck, from lawyers leaflets in the hospital, directly from doctors at the hospitals who have financial deals with lawyers, or from the driver's motoring association. The going rate for passing a case on to a law firm is between £250-500. [63]

71. The Department, relying on the Better Regulation Task Force report of 2004 *Better Routes to Redress* has indicated that it sees the activities of claims intermediaries as contributing to a "have a go culture". While there are established complaints mechanisms and bodies to help people who are unhappy at the way they have been treated by solicitors or insurers, there has been no clear cut equivalent in the case of claims intermediaries. In June 2004, the Government published a consultation paper on the simplification of CFAs entitled *Making Simple CFAs a Reality*. The proposed legislative framework would allow the Secretary of State either to designate a private body to regulate claims management service, to establish a body to regulate, or to regulate himself. The Bill includes a power to investigate unauthorised activities and prosecute those who try to avoid regulation.

72. We did not receive a substantial amount of written evidence about practical measures that could be implemented to regulate claims managers and remarkably few details are contained within the Compensation Bill [Lords]. Issues that arose included misleading advertising and the mis-selling of ATE insurance.[64] A further issue, which was raised at the Risk and Redress conference,[65] was anecdotal evidence that some claims management companies had provided claimants with specific incentives to pursue claims, such as "upfront" loans or consumer products.

73. Teresa Perchard, on behalf of Citizens Advice, stressed the need for the types of practical measures envisaged by the Government to be spelt out.

> [T]he essential thing is how do you authorise people to operate in a particular market sector? There is a lot of regulatory experience with regulating fairly disparate business sectors, such as debt collectors and insurance intermediaries; people who sell you cars are often selling you credit and insurance at the same time and will need consumer credit licences from the OFT and come within an authorisation regime run by the FSA. I would be looking for a system where you have to get prior permission or authorisation in order to be in the business of introducing people to a

63 *Time to end the rich pickings for claims lawyers and insurers*, The Times, 1 November 2005, Martyn Day (partner at Leigh, Day and Co)

64 See for example Q247, where James Sandbach from Citizens Advice commented that this type of practice occurred

65 *Risk and Redress: Preventing a compensation* culture, 17 November 2005

> "no win, no fee" agreement. And that you close off access to market by expecting or even requiring any receiving firms, whether solicitors or insurers, to deal with authorised intermediaries only. Then you have a question about what are your standards to let people into the market in the first place: are you just looking for absence of criminal convictions in terms of fitness, or do you require people to demonstrate some knowledge or commitment in terms of having complaints procedures and certain ways of practising? Do you regulate the forms that they use and do you even get on to regulating the price? Do you regulate the advertising beyond general concepts of what is misleading? The Bill does very little about describing what the system of regulation is going to look like. Those are certainly the sorts of things that we will be looking for and we have been talking to the Government about introducing.[66]

74. Many witnesses mentioned advertising by claims management companies in oral evidence. Stephen Walker, the Chief Executive of the NHS Litigation Authority commented that:

> I think it was a bad move to allow advertising. I think the initial allowing of advertising - this is going to make me sound like a real reactionary, I realise - many of us thought it was going to be the thin end of the wedge, and so it has proved. I think that advertising, except in specialist areas, is very dangerous, yes. I come back to my point about most people's experience of the law being mediated by and through the first lawyer they meet, and he or she may not be the optimum person to be handling their particular problem at that time.[67]

75. In relation to the specific issue of advertising, Teresa Perchard said:

> I do not think advertising in itself is a bad thing because many consumers learn about things through advertising and marketing, and that has a much bigger reach through broadcasts, direct mail than anything my organisation can achieve or afford. Given it is getting out there and has potential to tell consumers about their rights, the possibilities, how things can work, how can we make sure that consumers are not misled and advantage is not taken [...]There is a highly specific scheme of regulation of consumer credit advertising which deals in minute detail with things about the basis of the APR that you use for advertising and typical rates, and the prominence of certain messages and questions about responsible and misleading credit advertising. Why not the same kind of issue about responsible, not misleading, advertising relating to access to legal services including access to the personal injury claims system?[68]

76. Some forms of advertising are clearly distasteful. Whilst limitations on advertising may be required, some form of public debate is necessary about the extent of those limitations. When the Department implements the provisions of clauses 2 and 9 of the Compensation Bill [Lords],[69] further consideration will need to be given to this issue. On the evidence we

66 Q244

67 Q201; and see also Q202 where he went on to condemn the practice of advertising in NHS premises, which he stated had been caused by the issue of long term leases or management contracts

68 Qq245, 246

69 Which makes reference to the provision of claims management service and pretending to be authorised

have received, no one would support the placement of advertisements at sites owned by NHS Trusts, since that would clearly have some psychological impact on staff and may prey on people in a vulnerable position. Baroness Ashton of Upholland, the Parliamentary Under Secretary of State, also accepted that allowing the placement of advertisements in public buildings, like hospitals and police stations, gave them a legitimacy which they did not deserve.[70] The use of specific incentives by claims management companies to attract clients to bring claims should also be discouraged.

77. When we started the inquiry there was some speculation that the Claims Standards Council (CSC), an industry body, would be allowed to regulate claims managers.[71] The CSC is a non-governmental organisation which is attempting to introduce self-regulation for claims management companies. Membership is voluntary, so claims management companies do not have to join.

78. We note that the Bill establishes a statutory framework for the regulation of claims managers. However, the Bill only allows the Secretary of State to designate an appropriate person as a regulator and he can only create a new body if he thinks that no existing body is suitable for designation. Although the existing Claims Standards Council might seem to be a credible candidate as an organisation to be named as regulator we note that it has little funding and relies on volunteers for its support. Without in any way wishing to criticise the Claims Standards Council, a more professional solution is required if regulation is to be effective.

79. In the Explanatory Note to the Bill, the Government indicates that "it is anticipated that the regulation of claims management services would in due course be integrated into the proposed new regulatory framework for legal services set out in the Government's recent White Paper *The Future of Legal Services: Putting Consumers First*.[72]

80. In oral evidence, Baroness Ashton of Upholland was unable to inform us who would end up regulating the market.[73] She did discuss the possibility of exempting certain types of organisation (such as trade unions) from regulation.[74] We do not see any benefit in that approach, since all claimants should have protection and the opportunity of redress, where malpractice has occurred. No one would seek to defend the practices that have been identified. If organisations are convinced that they already meet the necessary standards and sign up to the proposed Code of Conduct,[75] then they should not have to incur any substantial additional costs. We would expect that trade union services would be able to

70 Q276

71 See for example *Curbs on 'compensation culture anger' lawyers*, Financial Times, 4 November 2005, Bob Sherwood

72 Cm 6679

73 Q279; but she did suggest that there could be a broadly similar structure to that which controls intermediaries under the Consumer Credit Act 1974

74 Q281

75 The explanatory note to the Bill makes clear that the Bill would enable the Regulator "to make rules for and issue a code of practice about the professional conduct of authorised persons. Regulations may specify the manner in which rules and codes of practice are to be prepared and published, provide for consultation and approval by the Secretary of State. An authorised person's failure to comply with rules and/or a code of practice could be used as a basis for imposing conditions on, suspending or cancelling authorisations. The regulations may also include provisions for appeals where an authorised person is found to be in breach of the rules or code of practice and has their authorisation cancelled, suspended or made subject to conditions"

comply with any regulatory regime without any difficulty. Accordingly, we do not consider that there should be any exemption from regulation under the Bill.

81. **We are pleased that the Government is now moving to regulate claims "farmers" who act as intermediaries referring cases to solicitors. This work is undertaken by a range of organisations including not only commercial companies but also trade unions and voluntary bodies. The system of regulation and redress needs to ensure that claimants are protected and that enforceable codes of practice apply. Regulation is long overdue and we hope that it will assist in restoring the reputation of the many legal professionals and others in the field who fulfil a necessary function ensuring that deserving claimants receive adequate compensation.**

82. **The Compensation Bill [Lords] lacks detailed proposals on how the Government intends to regulate claims management companies. There are a number of important issues that need addressing, including advertising, potential mis-selling of insurance products and the quality standards that an authorised person needs to meet. Self-regulation of claims management companies would be insufficient and undesirable. The market is relatively new, too diffuse and many different services can be offered to consumers, from financial products to quasi-legal advice.**

83. **We favour a system whereby claims managers would be subject to the same type of overarching supervision that is being proposed by the Government for the legal profession. We also believe that all persons involved in the claims management process should meet minimum standards. Finally, we suggest that some limits need to be placed on the nature and placement of advertisements by claims management companies. Given the obvious benefits that all of these changes would bring, we do not see any benefit to consumers in granting organisations exemptions from regulation.**

4 The NHS Redress Bill [Lords]

84. The Government introduced the NHS Redress Bill [Lords] to establish "a scheme to enable the settlement, without the need to commence court proceedings, of certain claims which arise in connection with hospital services provided to patients as part of the health service in England, wherever those services are provided."[76] ("The Redress scheme").

85. When we started our inquiry, the Government had not provided any details as to how the scheme would work in practice, save that it would not (at least initially) apply to claims deemed to be worth more than £20,000. In theory, where the NHS identified that it had acted negligently, or where someone brought a complaint against it, an internal investigation would then be carried out, to confirm whether there had indeed been a negligent act. Once that had occurred, an apology would be conveyed to the individual, as well as a financial offer to settle any claim, where appropriate.

86. In a subsequent written submission to the Committee, the Department of Health set out a brief background to the NHS Redress Bill [Lords]. It indicated that:

> The NHS Plan stated that the Department of Health would examine ways to improve the system of handling and responding to clinical negligence claims that are made against the NHS. A commitment in the Government's 2001 manifesto to reform the approach to handling clinical negligence claims in the NHS reinforced this approach. In August 2001, the Chief Medical Officer (CMO), published a paper, *'Call for Ideas'*, inviting patients, NHS staff, the public and other key stakeholders to give their views on how the NHS of the future should handle clinical negligence incidents. The CMO also led a series of meetings with an expert advisory group to develop thinking in this area. In June 2003, the CMO published his consultation document *Making Amends*, which set out recommendations for reform. The key recommendation in *Making Amends* (Recommendation 1) is that: "An NHS Redress Scheme should be introduced to provide investigations when things go wrong; remedial treatment, rehabilitation and care when needed; explanations and apologies; and financial compensation in certain circumstances."[77]

87. The Department went on to state that the current arrangements for dealing with clinical negligence cases:

- are perceived to be complex, unfair (as apparently similar cases may have different outcomes) and slow;
- are costly both in terms of legal fees and in diverting clinical staff from clinical care;
- have a negative effect on NHS staff, morale and on public confidence;
- lead to patient dissatisfaction with the lack of explanations or apologies and the lack of reassurance that action has been taken to prevent the same incident happening to another patient; and

76 Explanatory Note to the NHS Redress Bill

77 Ev 105, para 2

- encourage defensiveness and secrecy in the NHS, which stands in the way of learning and improvement in the health service.[78]

Independent Legal and Medical Advice

88. Initially, when we began the inquiry, the main concerns that were expressed related to whether the Redress scheme proposed would be sufficiently independent. The two issues which arose were whether claimants would receive independent legal advice and whether claimants would be entitled to independent medical reports. In its written evidence, the Law Society stated that:

> The Society's major concern at this stage is that the Bill does not go into sufficient detail as to how the scheme will operate. Whilst the Society supports the general intention of the Bill, the Bill should include much more detail as to how the scheme will actually operate on a day to day basis and who will make particular decisions. The Bill should provide for a panel of experts to assess each case, and for those experts to be competent and totally impartial. Additionally, legal advisers will not be in a position to assess the appropriateness of an offer made by the Redress Scheme without access to documentation including an independent medical report and an independent report on the evidence on which the claim is based. The Society believes that these are fundamental requirements to the success of any scheme. Anything less will not have the trust or confidence of potential applicants.[79]

89. We were concerned to hear from the Law Society in oral evidence that they had not been contacted by the Department of Health about how the scheme would operate. Anna Rowland commented that:

> We have not had any contact from the Department of Health. We have written to the[m] very recently seeking a meeting to talk through some of the practical details about how the redress scheme might work, but that is quite recent so we have not got to a point of setting a date yet, or anything.[80]

90. When we put this issue to Rt Hon Jane Kennedy MP, the Minster of State at the Department of Health, she was unable to give an immediate answer as to whether her Department had consulted with either the Law Society or any groups representing lawyers, despite the fact that she indicated that she hoped that lawyers would be willing to work for "fixed fees".[81]

91. Stephen Walker, the Chief Executive of the NHS Litigation Authority, which is likely to be tasked with running the Redress scheme, tried to allay these concerns when he gave oral evidence, stating that independent medical reports would be provided to claimants in addition to independent legal advice. In particular, he commented that:

78 *ibid*, para 3

79 Ev 70

80 Q83

81 Qq285, 288

> I know that independence has exercised a great number of people. I will say something about that in a moment, if time allows, Mr Chairman, but the specific answer to your question is that there will be independent medical reports. If the trust concedes liability when they report to us in the first place, there is no issue, we would admit liability - that is what we do now. If the trust says, "Sorry, no liability", or, "We do not think so", or, "We are not sure", then, with the claimant's advisers, we will identify a suitably qualified independent medical expert and there will be joint instruction to avoid any question of a lack of independence, if you like. We will pay for that independent expert.[82]

92. The Minister of State was also keen to stress her view that the Redress scheme would promote a culture of openness within NHS Trusts. She claimed that "I know that there is an appetite out there amongst health professionals to make sure they say "[t]here is a mistake here. I have made a mistake and this is what has happened as a result."[83] We find that difficult to accept, since doctors and other health professionals would still be subject to professional discipline (for example from the General Medical Council). In those circumstances, where a mistake, or more seriously, a series of mistakes has occurred, we believe it is unlikely that the person will be more likely to step forward as a result of the introduction of this scheme.

93. We are concerned that if the organisation which is responsible for defending trusts and hospitals is also charged with running the scheme, there may be a perception (whatever the reality) of a conflict of interest. Some of the Minister of State's observations about the scheme, namely that it would be welcomed by health professionals, were speculative and not based on any real evidence put before us.

94. **It is surprising that the Department of Health has brought forward an ambitious Redress Scheme, without setting out in detail how it will be run. During the course of our inquiry, the NHS Litigation Authority was still unaware as to whether it would definitely be responsible for running the scheme. We were informed that contact had not been made, either with lawyers or medical experts, about whether they would work for fixed fees and to the timetables envisaged. These lapses appear to threaten the viability and effectiveness of the scheme.**

Other potential difficulties

95. The Explanatory Note to the NHS Redress Bill [Lords] suggests that the annual cost of administering the Redress Scheme would be between £3.2 and £11.2m.[84] There is a concern that the saving of costs on private legal representation may simply be matched by the increased costs of an administrative system supplemented by private legal representation. In a written submission, the Medical Defence Union, a provider of medico-legal services to doctors and dentists including indemnity insurance policies, indicated that:

82 Q228

83 Q300

84 Explanatory note to the NHS Redress Bill, Financial Effects

> The NHLSA's most recent accounts show that compensation payments for 2004/5 were £502 million and that liability for known and incurred but not reported clinical negligence could potentially amount to £6.8bn. In our experience about 2/3 of total liability for clinical negligence resides in a small number of large claims in which as much as 75% of the damages may be awarded for future care.[85]

96. If this is, in fact, the case, then it is difficult to see how the Redress Scheme will make a difference to overall costs, since it would not (at least initially) apply to claims deemed to be worth more than £20,000. In those circumstances, it would only have an effect if it is subsequently extended to all claims against the NHS. When we put this question to the Minister, she said:

> One of the beauties of doing regulation by secondary level legislation which we do in Parliament - which when you are in government you love, when you are not in government, you get very frustrated by - is that you can quickly and relatively easily make amendments of that kind to legislation of this nature, so we think that we will be able to do that because of the way we set up the legislation.[86]

This "flexibility" is unlikely to promote confidence in the scheme.

97. We were particularly surprised that if a claim made under the Redress Scheme subsequently turns out to exceed £20,000 it will be rejected.[87] This appears to us to be a potential waste of resources if both the claimant and the NHS Litigation Authority are happy to continue under the scheme.

98. An additional problem may be that people who do not qualify for legal aid would be more likely to pursue compensation under the Redress Scheme. At present, eligible claimants may obtain legal aid for clinical negligence claims but for those outside legal aid it is difficult to bring medical negligence cases under a CFA since the costs are typically much higher and there are frequently higher risk variables.

99. In oral evidence, the NHS Litigation Authority stated that they had run a scheme similar to the one that was envisaged by the Department of Health, which they referred to as a 'pilot'. Drawing on the evidence from that scheme, it became evident to the NHS Litigation Authority that most of the claimants under the 'pilot' were people who would not have claimed under the existing process. Stephen Walker commented that:

> Under our pilot we believe that almost all the claims were claims which would not have been made but for the existence of the scheme. We were told both by the independent assessor who looked at the scheme only halfway through – he did not look at the very end for various reasons – that was the case, but I was also personally told, and I believe John [another witness who appeared on behalf of NHSLA] was too, by quite a number of claimant solicitors, that they used the scheme for cases that they would not otherwise have (to use their phrase) "bothered with" probably for economic reasons. I think it is probable that we will see more claimants, and that comes to the issue of striking a balance between on the one hand providing access to

85 Ev 121, para 8

86 Q299

87 Q289

> justice for damaged patients, because no-one will be paid unless they establish a legal liability, and on the other hand cost. That is always a balancing exercise. Fortunately, it is one for the Department, not for my organisation, but, yes, there is always a risk that if you help people to gain access to justice it might cost you money.[88]

100. We put it to both Stephen Walker and the Minister of State that, given these potential difficulties, there could be substantial benefits in running a proper pilot, followed by a comprehensive assessment by the Department. Stephen Walker set out his views of the benefits and challenges of running such a pilot:

> There are pros and cons. It is awfully difficult, setting up pilots, to mimic wider scale practice. Do we pick a Strategic Health Authority and do it there, or do we say a fixed time, do we say everything that comes through the door next month, whatever it may be. How do we monitor it? None of this comes resource free either, of course, and so the debate continues […] The pros would be that we might learn more lessons about how best to do it and whether or not we are able to set realistic targets, whether we can garner enough independent experts who are prepared to react very quickly for us at fixed fees, whether or not the legal profession is prepared to support this.[89]

101. The Minister of State was "relaxed" about the potential cost implications, which she stated could equate to £48m in the first year and rejected the idea of a pilot or even a system of targets.[90] The explanatory note to the Bill suggested that "Departmental modelling suggests that the projected financial effect in year ten of the scheme's operation would range between a saving of £15m (if there were only small increases in Redress claims) and an increased cost of an extra £80m (if there were large increases in Redress claims)."[91]

102. We are concerned about this approach. Both the Minister of State and Stephen Walker referred to a previous pilot offering free independent legal advice to claimants which had been conducted by the NHS Litigation Authority, but that 'pilot' had not been publicised. Stephen Walker admitted that it had not been independently assessed throughout. It is impossible to see how the Department could accurately forecast the potential demand for the Redress scheme on the basis of the evidence we heard.

103. **Given the particular concerns which have been expressed about the potential expenditure and difficulties inherent in the Redress Scheme, it is essential that it is piloted, and that the pilot be comprehensively assessed, to ensure that the benefits that it will bring are sufficient to outweigh the costs. We are alarmed that the Department of Health is "relaxed" about the possible cost implications of the scheme, since we believe that it is difficult to forecast the potential demand accurately.**

88 Q220

89 Qq216-218; following the conclusion of our oral evidence, the Committee received a memorandum from Mr Brian Raincock, the managing director of Resolve Services Limited (Ev 127–128). He raised a number of serious allegations about the evidence of Stephen Walker. He stated that the RESOLVE pilot was designed, organised and run by Resolve Services Ltd (RSL) "with the reluctant co-operation of the Chief Executive of the NHSLA", and went on to add, *inter alia*, that it was RSL, rather than the NHSLA who had set the six month target for claims resolution, that "the relationship with the independent experts was established by RSL, […] and the fact that it worked had nothing whatsoever to do with the NHSLA". These allegations did not affect our conclusion on the matter of establishing a pilot (below), although they challenge the accuracy of some of the evidence we received from NHSLA

90 Qq291, 296 and 297

91 Explanatory note to the NHS Redress Bill, Financial Effects

104. **The Government has modified the proposals for a redress scheme and restricted the scheme to low value cases. There is a danger that the scheme will not be cost-effective. Some of the objectives which the Government has set out for the scheme could be achieved by other means, such as more open and transparent handling of claims and the willingness to admit mistakes of health professionals on a more extensive basis than has previously been the case in the Health Service. Another concern is that claimants may be ineligible for legal aid if they fail to use the Redress Scheme.[92] This would arise if it became a requirement for obtaining Legal Aid that the scheme be used first. The impact of this would be greater if, as seems possible, the threshold of £20,000 were to be increased in the future. Where so much is to be done by secondary legislation, it is unfortunate that such issues have not been adequately addressed in the main body of the Bill.**

Care contracts

105. During the course of the inquiry, the Committee attempted to take detailed evidence on the issue of care contracts. Because of the lack of detail in the Government's proposals, this proved difficult. Oral evidence from District Judge Oldham[93] and Stephen Worthington, Vice Chairman of the Bar Law Reform Committee[94] suggested that judges and barristers are becoming more involved in long term care issues through the introduction of the periodic payments system. However, we were told by Anna Rowland, Policy Manager for Civil and Family Justice at the Law Society, that from her perspective there had been no discussion of the detail of care contracts.[95] We believe that relatively little attention has been paid to this area, although we accept that this is likely to be because the threshold of £20,000 proposed under the Redress scheme would not generally affect those people who had sustained serious injury requiring long term care.

106. Care contracts remain an important issue. The Department of Health Statement of Policy on NHS Redress raises some questions about the Care Contract proposal. In particular, paragraph 38 states that the overall limit of £20,000 will not include the cost of remedial care. This suggests that care contracts may be relevant in more serious cases involving for example, the elderly, where the award of general damages may be low, there may be limited financial loss but there will be costly remedial care. On the other hand, paragraph 52 states that 'It is not intended that offers of redress will include care or treatment wider than clinical care'. This implies that care contracts will not have a major role to play in the rehabilitation agenda. The exclusion of rehabilitative and social care may be regarded as unfortunate in the light of evidence from Nick Starling, Director of General Insurance, that rehabilitation services are not as developed as they should be[96] and that an impetus from government and the health service is required.[97]

92 We did not receive a satisfactory response from LSC on this when we asked them; see Constitutional Affairs Committee, Oral evidence, 14 February 2006, HC 919-i, Qq76–78

93 Q51

94 Q106

95 Q85

96 Q134

97 Q122

107. Paragraph 35 of the Policy Statement indicates that the care may be provided or commissioned by a scheme member. This raises a question about the role of private health care providers under the scheme. At present accident victims may claim the expenses of private health care as s2(4) of the Law Reform (Personal Injuries) Act 1948 – which applies to personal injuries cases only - provides that in determining whether medical expenses are reasonable, the possibility of avoiding such expenses by making use of the NHS is to be disregarded. It seems implicit in the Redress proposal that the right to claim private remedial treatment may be indirectly removed by an offer of a care contract. If this is the case, the issue should be fully debated since claimants may not wish to be treated by the same health professionals who caused the original injury.

108. One final issue was whether the care contract principle is one which could eventually apply much more widely and could replace the granting of large capital sums to people who are very seriously injured. In the light of the written evidence of the Medical Defence Union (its 2001 response to the Clinical Negligence consultation) that £1bn of the NHS's £3.9bn liability as of 2000 could be redirected to the NHS if care contracts replaced awards of damages, this question merits further consideration.

109. The Minister noted that she recognised that up to a quarter of NHS liability payments are spent on remedial care and that she was keen to make more use of care contracts.[98]

110. **We recommend that further consideration be given to the proposal in clause 3(3)(a)of the NHS Redress Bill [Lords] to offer a 'contract to provide care or treatment' as part of the Redress scheme. On the basis of the evidence that we have received, we believe that relatively little attention has been paid to this area of reform, although we accept that this may be because the relatively low threshold of £20,000 means that patients in need of a significant period of remedial care are unlikely to be affected by the Redress Scheme.**

98 Qq304-305

5 Conclusion

111. There are no easy answers to the difficulties exposed in the compensation system during this inquiry. It is evident from the statistical evidence that the UK is not moving towards a "compensation culture" driven by a significant increase in litigation. That said, however, there is ample evidence that risk aversion is becoming an insidious problem which the Government and the Health and Safety Executive must attempt to address.

112. While the accumulation of stories published in the press about compensation and risk aversion may give a distorted impression, they still have a significant effect in leading people to become more risk averse. The Health and Safety Executive mentioned a "grapevine" effect, which spreads the popularly held notion that it is easy to obtain compensation and leads people to believe that all risk must be avoided. Indeed in those stories of undue risk aversion that are pursued and found to be true, it is often a misplaced fear of or misinterpretation of health and safety legislation that is cited as a problem, overwhelming the decision makers' common sense. It sometimes involves the use of health and safety as an excuse for decisions which originate with financial or other considerations. We do not believe that the attempted statutory restatement of the common law will have any useful effect. The phenomenon of risk aversion which we have described does not arise primary from the wording of the law or from litigation and will need to be addressed by changing practices and perceptions in the fields of health and safety and risk management. These go beyond the scope of the Compensation Bill [Lords].

113. We welcome the fact that the Compensation Bill [Lords] sets out to provide a system of regulation for claims managers, but we were disappointed to find little detail in the Bill and a number of unresolved issues.

114. On the basis of what we have been able to establish so far, we are not convinced that the NHS Redress Scheme is adequately prepared.

Conclusions and recommendations

Conditional Fee Agreements

The use of CSAs

1. The introduction of CFAs was designed, in part, to widen access to justice. The evidence appears to show that it has had some success in meeting that aim, although perversely some cases which previously would have received legal aid funding may not receive CFA funding because the chances of success are not high enough. Conditional fee agreements have not directly caused the perception of a compensation culture. The statistics demonstrate that the number of claims has not risen since CFAs were introduced as the primary method of funding personal injury claims. Nonetheless, we agree with the conclusions drawn by Citizens Advice, that the introduction of CFAs (and with it a class of unregulated intermediaries acting as claims managers) has adversely affected the reputation of legal service providers, whether professional lawyers or not. The increased awareness of the public that it is possible to sue without personal financial risk, when combined with media attention to apparently unmeritorious claims being brought, has contributed to a widely held opinion that we do indeed have a compensation culture. (Paragraph 17)

2. It is not easy to design a system whereby a claimant without funds is allowed access to justice without exposing the defendant to the chance that he will not recover the costs of the action if the claimant is unsuccessful. Given the power of the press, it is right that people should have a remedy when have been defamed; and because of the high level of costs inherent in bringing a claim it is likely that those with modest means will continue to have to rely on CFAs. (Paragraph 29)

3. The uplifts which claimant's solicitors receive should reflect the risk that they bear. Reassessment of risk as the claim proceeds may go some way to ensuring proportionality, but only for that stage of the proceedings. This would require a clearly staged process. Further use of cost capping orders may prove useful in some circumstances. The courts need to ensure that appropriate case management takes account of proportionality, preferably before the costs are actually incurred. (Paragraph 30)

The Compensation Bill [Lords] and Risk Aversion

Excessive Risk Aversion

4. We believe that the question of how to set targets for the HSE is an important one, since it may well affect the culture of the organisation. If the targets are set in terms of a reduction in the number of accidents, rather than in terms of ensuring that reasonable measures are taken to reduce risk, the likely outcome is that activities will be stopped altogether rather than being better managed. We believe that the basis of these targets should be reviewed. (Paragraph 49)

5. The HSE admitted that it was unable to conduct risk balancing exercises looking at the dangers of different risks. We do not accept this and believe that the HSE should find ways of doing so. (Paragraph 49)

6. It has also been suggested that authorities and other bodies fall back on health and safety arguments when they are unable to provide a service for financial or other reasons. Such practices should be identified and eradicated. (Paragraph 50)

7. While we accept that health and safety issues can be an easy scapegoat for many problems, far more has to be done to educate the public that responsible risk management does not equate to the avoidance of all risk. (Paragraph 51)

Clause 1 of the Compensation Bill [Lords]

8. Methods of stemming current levels of risk aversion go to the heart of the compensation culture debate. While the number of people claiming compensation may not have risen in recent years, a contrary perception remains. The fear of prosecution by the Health and Safety Executive is likely to combine with the exaggerated fear of being sued to discourage people from planning or undertaking activities which require risk management and may also impact on the competitiveness of business. (Paragraph 52)

9. We agree with the majority of the evidence that we have received that clause 1 to the Compensation Bill [Lords] is unnecessary. We have concluded that it should not be in the Bill. While it is undoubtedly well meaning, it satisfies neither those who wish to reduce risk aversion in society, nor those requiring legal certainty. It is impossible to encapsulate the law of negligence in a single sentence. (Paragraph 67)

10. If clause 1 were implemented, it would undoubtedly, at least in the short term, lead to an increase in costly satellite litigation to define what is a "desirable activity". Moreover, the wide breadth of that term (or any alternative proposed such as "social value" or "utility") could have unforeseen consequences, since while the Government states that it is not intended to change the law, it is likely that interested parties will seek to rely upon the clause before the courts in order to improve their shield against liability. This could result in possibly inconsistent decisions where judges try to refine further the concept of "desirable activity". (Paragraph 68)

Regulation of claims management companies

11. We are pleased that the Government is now moving to regulate claims "farmers" who act as intermediaries referring cases to solicitors. This work is undertaken by a range of organisations including not only commercial companies but also trade unions and voluntary bodies. The system of regulation and redress needs to ensure that claimants are protected and that enforceable codes of practice apply. Regulation is long overdue and we hope that it will assist in restoring the reputation of the many legal professionals and others in the field who fulfil a necessary function ensuring that deserving claimants receive adequate compensation. (Paragraph 81)

12. The Compensation Bill [Lords] lacks detailed proposals on how the Government intends to regulate claims management companies. There are a number of important

issues that need addressing, including advertising, potential mis-selling of insurance products and the quality standards that an authorised person needs to meet. Self-regulation of claims management companies would be insufficient and undesirable. The market is relatively new, too diffuse and many different services can be offered to consumers, from financial products to quasi-legal advice. (Paragraph 82)

13. We favour a system whereby claims managers would be subject to the same type of overarching supervision that is being proposed by the Government for the legal profession. We also believe that all persons involved in the claims management process should meet minimum standards. Finally, we suggest that some limits need to be placed on the nature and placement of advertisements by claims management companies. Given the obvious benefits that all of these changes would bring, we do not see any benefit to consumers in granting organisations exemptions from regulation. (Paragraph 83)

The NHS Redress Bill [Lords]

Independent legal and medical advice

14. It is surprising that the Department of Health has brought forward an ambitious Redress Scheme, without setting out in detail how it will be run. During the course of our inquiry, the NHS Litigation Authority was still unaware as to whether it would definitely be responsible for running the scheme. We were informed that contact had not been made, either with lawyers or medical experts, about whether they would work for fixed fees and to the timetables envisaged. These lapses appear to threaten the viability and effectiveness of the scheme. (Paragraph 94)

Potential difficulties

15. Given the particular concerns which have been expressed about the potential expenditure and difficulties inherent in the Redress Scheme, it is essential that it is piloted, and that the pilot be comprehensively assessed, to ensure that the benefits that it will bring are sufficient to outweigh the costs. We are alarmed that the Department of Health is "relaxed" about the possible cost implications of the scheme, since we believe that it is difficult to forecast the potential demand accurately. (Paragraph 103)

16. The Government has modified the proposals for a redress scheme and restricted the scheme to low value cases. There is a danger that the scheme will not be cost-effective. Some of the objectives which the Government has set out for the scheme could be achieved by other means, such as more open and transparent handling of claims and the willingness to admit mistakes of health professionals on a more extensive basis than has previously been the case in the Health Service. Another concern is that claimants may be ineligible for legal aid if they fail to use the Redress Scheme. This would arise if it became a requirement for obtaining Legal Aid that the scheme be used first. The impact of this would be greater if, as seems possible, the threshold of £20,000 were to be increased in the future. Where so much is to be done by secondary legislation, it is unfortunate that such issues have not been adequately addressed in the main body of the Bill. (Paragraph 104)

Care contracts

17. We recommend that further consideration be given to the proposal in clause 3(3)(a)of the NHS Redress Bill [Lords] to offer a 'contract to provide care or treatment' as part of the Redress scheme. On the basis of the evidence that we have received, we believe that relatively little attention has been paid to this area of reform, although we accept that this may be because the relatively low threshold of £20,000 means that patients in need of a significant period of remedial care are unlikely to be affected by the Redress Scheme. (Paragraph 110)

Witnesses

Tuesday 6 December 2005

Tuesday 13 December 2005

Tuesday January 10 2006

Tuesday 17 January 2006

Tuesday 31 January 2006

List of written evidence

(See Volume II)

Association of District Judges
Law Society
Association of Personal Injury Lawyers (APIL)
Motor Accident Solicitors Society (MASS)
Bar Council
Association of British Insurers (ABI)
Norwich Union
Allianz Cornhill Legal Protection (ACLP)
Health and Safety Executive (HSE)
Scout Association
Volunteering England
NHS Litigation Authority
Advice Services Alliance (ASA)
Department for Constitutional Affairs (DCA)
Department of Health (DoH)
Associated Newspapers
Guardian Newspapers
Trade Union Congress (TUC)
Medical Defence Union
Ken Oliphant, Cardiff Law School
St John Ambulance
All Party Group on Adventure and Recreation in Society (A RISc)
Resolve
Newspaper Society
Times Newspapers Ltd
Bloomberg News
British Broadcasting Corporation (BBC)
Channel 4 Television Corporation
Newsquest Media Group
Ian Hislop, Editor, Private Eye
Trinity Mirror Plc
Independent News and Media
Reynolds Porter Chamberlain
Media Law Resource Center (MLRC)
Karen Stewart
Advertising Standards Authority (ASA)
Zurich Financial Services
AXA Insurance
Actuarial Profession
Aon Ltd
National Accident Helpline (NAH)

WITNESS (against abuse by health and care workers)
Action Against Medical Accidents (AvMA)
British Association of Leisure Parks, Piers and Attractions Ltd (BALPPA)
Field Studies Council
Anthony H Silverman, Fellow, Institute of Actuaries
Kevin Williams, Sheffield Hallam University
Professor Michael Jones, University of Liverpool
Richard Mullender, Lecturer, Newcastle Law School
Mark Lunney, Associate Professor, School of Law, University of New England, Australia
Berrymans Lace Mawer
Andrew Twambley, Director, injurylawyers4u.co.uk
Kerry Underwood, Underwoods Solicitors
Andrew Parker, Head of Strategic Liaison, Beachcroft Wansbroughs
Tony Jaffa, Partner, Foot Anstey Solicitors
Richard Shillito, Partner, Farrer & Co
Davenport Lyons Solicitors
Thompsons Solicitors
Amicus
InterResolve Holdings Limited
Headmasters' & Headmistresses' Conference (HMC)

Formal minutes

Tuesday 14 February 2006

Members present:

Mr Alan Beith, in the Chair

James Brokenshire
David Howarth
Barbara Keeley
Julie Morgan
Keith Vaz
Dr Alan Whitehead
Jeremy Wright

Draft Report [Compensation culture], proposed by the Chairman, brought up and read.

Ordered, That the Chairman's draft Report be read a second time, paragraph by paragraph.

Paragraphs 1 to 114 read and agreed to.

Summary read and agreed to.

Conclusions and recommendations read and agreed to.

Resolved, That the Report be the Third Report of the Committee to the House.

Ordered, That the Chairman do make the Report to the House.

Ordered, That the provisions of Standing Order No 134 (Select Committees (Reports)) be applied to the Report.

Several papers were ordered to be appended to the Minutes of Evidence.

Ordered, That the Appendices to the Minutes of Evidence taken before the Committee be reported to the House.

[Adjourned till Tuesday 28 February at 4.00pm

Reports from the Constitutional Affairs Committee

Session 2005-06

First Report	The courts: small claims	HC 519
Second Report	The Office of the Judge Advocate General	HC 731

Session 2004–05

First Report	Freedom of Information Act 2000 — progress towards implementation	HC 79
	Government response	*Cm 6470*
Second Report	Work of the Committee in 2004	HC 207
Third Report	Constitutional Reform Bill [*Lords*]: the Government's proposals	HC 275
	Government response	*Cm 6488*
Fourth Report	Family Justice: the operation of the family courts	HC 116
	Government response	*Cm 6507*
Fifth Report	Legal aid: asylum appeals	HC 276
	Government response	*Cm 6597*
Sixth Report	Electoral Registration (Joint Report with ODPM: Housing, Planning, Local Government and the Regions Committee)	HC 243
	Government response	*Cm 6647*
Seventh Report	The operation of the Special Immigration Appeals Commission (SIAC) and the use of Special Advocates	HC 323
	Government response	*Cm 6596*